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From court to QCAT, or not

***Queensland Civil and Administrative Tribunal Act 2009* ss43, 53 – minor civil dispute proceeding in Magistrates Court – factors relevant to exercise of discretion to transfer to QCAT – relevance of parties’ legal costs – whether magistrate may make order that parties be legally represented before QCAT**

In *Sutton v Tang* [2015] QDC 191 Reid DCJ considered the circumstances that may be relevant to the exercise of the discretion to order a transfer of a proceeding to the Queensland Civil and Administrative Tribunal (the tribunal) under s53 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (the Act).

The issue also arose as to whether, on the proper construction of s53, a court transferring a proceeding to the tribunal had power to bind the discretion otherwise resident in the tribunal to make an order in respect of legal representation.

Facts

In June 2014, proceedings were commenced in the Magistrates Court in respect of a minor motor vehicle accident involving the applicant’s vehicle and a vehicle owned by the second respondent and driven by the first respondent. The claim and the counterclaim (in each case below \$2500) relating to the damage to the two vehicles, were prosecuted by the parties’ insurers though their rights of subrogation. Although commenced in the Magistrates Court, the matter was a ‘minor civil dispute’ as defined in Schedule 3 to the Act, and accordingly it was also within the jurisdiction of the tribunal under s11 of the Act.

The parties took all relevant steps in the proceedings and on 30 April 2015 they sent a completed and signed request for a trial date to the Magistrates Court, asking that the matter be set down for a one-day hearing.

On 7 May 2015 the Magistrates Court sent a notification to each of the parties seeking submissions as to why the proceedings should not be transferred to the tribunal. On 11 May 2015 the parties responded with joint submissions in support of their contention that the proceedings should remain in the Magistrates Court.

Despite the joint submissions, the magistrate who considered the matter on the papers on 20 May 2015 transferred the proceeding to the tribunal, and also ordered that both parties be legally represented before the tribunal.

The applicant sought leave to appeal to the District Court.

Legislation

Section 53 of the Act provides, so far as is relevant:

Transfer from a court

(1) If a proceeding is started in a court and the subject matter of the proceeding could be heard by the tribunal under this Act, the court may, by order, transfer the proceeding to the tribunal.

(2) If a court transfers a proceeding to the tribunal under subsection (1) –

...

(b) the court may make the orders and give the directions it considers appropriate to facilitate the transfer, including an order that a party is taken to have complied with the requirements under this Act, an enabling Act or the rules for starting a proceeding before the tribunal.

...

(4) A court may act under this section on the application of a party to the proceedings or on its own initiative.

Section 43 of the Act deals with representation in the tribunal. The stated main purpose of the provision is to have the parties represent themselves unless the interests of justice require otherwise: s43(1). Subsection 43(3) sets out a number of circumstances that the tribunal may consider as supporting the giving of leave, and these include that all of the parties have agreed to the party being represented in the proceeding.

Section 100 of the Act requires that parties bear their own costs of proceedings in the tribunal, unless otherwise provided under the Act or an enabling Act. Section 102(1) then authorises the tribunal to make an order requiring a party to a proceeding to pay all or a stated part of the costs of another party to the proceeding if the tribunal considers the interests of justice require it to make the order. Subsection (2) of s102 provides:

“(2) However, the only costs the tribunal may award under subsection (1) against a party to a proceeding for a minor civil dispute are the costs stated in the rules as costs that may be awarded for minor civil disputes under this section.”

The costs which may be awarded under s102 against a party to a proceeding for a minor civil dispute other than a minor debt claim are restricted by r83 of the *Queensland Civil and Administrative Tribunal Rules 2009* to an order that the party pay the applicant the amount of any prescribed fee paid by the applicant on filing the application for the proceeding.

Analysis

Transfer to tribunal – discretionary considerations

The parties had jointly submitted before the magistrate that as the respective insurers had taken over the proceedings through their rights of subrogation and both had legal representation, then the Magistrates Court was the appropriate forum for the proceedings to be heard.

Reid DCJ found that the magistrate was correct in rejecting this submission. His Honour regarded the agreement of both parties to being legally represented as a factor to be considered, but he concluded that the fact that a party has legal representation should not automatically entitle that party to have their minor civil dispute heard in a Magistrates Court.

The parties had also jointly submitted that they had each expended a significant amount on legal costs, and that the potential liability for legal costs was an important commercial factor that assisted to ensure the parties made all reasonable efforts to resolve issues before trial.

However, the magistrate had regarded the issue of liability for costs and its relevance to parties' commercial decisions as not a proper consideration to be weighed by a court in deciding the appropriate forum for the matter to be heard. Her Honour expressed the view that, if it were to be otherwise, any party who had engaged legal representation, and for whom costs were a commercial decision, would have grounds to have a matter heard in the Magistrates Court, and this would undermine the intention of the Act.

Reid DCJ regarded this conclusion as incorrect. In his Honour's view, s53 of the Act leaves the decision whether to transfer a matter to the tribunal to the discretion of individual magistrates or judges and does not seek to fetter that discretion in the way the magistrate concluded. His Honour found that the issue of costs was a factor to be taken into account in the exercise of the discretion, and that the magistrate was in error in concluding that it was not.

In examining how the issue of costs should influence the exercise of the discretion in this case, Reid DCJ noted that the transfer took place at a very late stage of the proceedings after disclosure, inspection, and without prejudice negotiations had been conducted, and that it was only when the parties requested a hearing that the court, of its own motion, determined to transfer the matter to the tribunal.

Reid DCJ also referred in this context to the possibility that settlement offers might have been made under the rules that might significantly protect whichever party was ultimately successful in relation to costs incurred or to be incurred. His Honour outlined the provisions in the Act and associated rules in relation to costs, as set out above, and said that their effect in this case was to limit the costs that the tribunal could order to be paid to the amount of any prescribed fee paid by the applicant on filing the application for the proceeding. There was no power to award any other costs, regardless of the extent to which they may have already been incurred before the proceedings were transferred. An implication of this was that the transfer of the matter to the tribunal at the late stage it had reached would have removed the benefits that one party may have gained as a result of a settlement offer.

Reid DCJ found overall that the costs issues he had identified, the very late stage of the proceeding when the order was made, and the wish of both parties to have the matter

decided in the Magistrates Court, were all factors strongly favouring the determination of the matter in that court.

Order for legal representation in the tribunal

The magistrate observed that, although there was no prima facie right to legal representation in the tribunal, leave can be given in the interests of justice. Her Honour referred to the matters the tribunal was entitled to take into account under s43 of the Act, and concluded that it would be in the interests of justice for the parties to be legally represented. Her Honour then ordered, purportedly in reliance on s53 of the Act, that both parties be legally represented before the tribunal.

Reid DCJ accepted that that the matter may have been one in which it was likely that the parties would be given leave to be legally represented before the tribunal, and that this belief was relevant to the exercise of the discretion whether to transfer the proceeding to the tribunal. His Honour concluded, however, that the order that the parties be legally represented before the tribunal was not an order “to facilitate the transfer” under s53(2)(b) of the Act, but rather was an order seeking to bind the discretion of the tribunal to make orders in respect of representation under s43 of the Act. His Honour held this order was outside the magistrate’s power and was made in error.

Leave to appeal?

As the amount involved in the proceeding was below the minor civil dispute limit, leave to appeal could only be granted “if some important principle of law or justice is involved”: *Magistrates Court Act 1921* (Qld), s45(2).

Reid DCJ concluded there was error in the magistrate’s judgment, both in respect of her power to make orders about legal representations, and in respect of her conclusion that the limited power in the tribunal to make costs orders was irrelevant to the exercise of her discretion. His Honour found both issues to involve “some important principle of law or justice” so as to justify the grant of leave to appeal.

Orders

Leave to appeal was granted, and the appeal allowed. The orders of the magistrate were set aside. It was further ordered that the proceedings remain in the Magistrates Court, and that they be transferred to the Brisbane registry of that court and set down for a one-day hearing forthwith.

Comment

In relation to the conclusion that the matter should remain in the Magistrates Court, the lateness of the application appeared to be the crucial factor. Reid DCJ suggested that it was likely his view would have been different if the matter was transferred at an earlier time in the proceeding.

Also worthy of note is the judge's statement that his determination "should not be seen as an indication that parties can, by agreement, effectively bind the discretion a court must exercise in determining whether to transfer proceedings to the tribunal".